BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
ELLSWORTH E. AND CAROLYN L. TULBERG)

Appearances:

For Appellants: Carolyn L. Tulberg, in pro. per.

For Respondent: Kendall E. Kinyon
Gary Jerrit
Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Ellsworth E. and Carolyn L. Tulberg against a proposed assessment of personal income tax and penalties in the total amount of $8,668.47 for the year 1979.

The sole issue is whether appellants have established error in respondent's proposed assessment of penalties.

Appellants filed a California personal income tax return form for 1979 which disclosed no information about their income. Appellants did enter amounts for their estimated tax payments, exemption credits and tax liability. The balance of the spaces the form provided for required information were filled in with the words "objection - self incrimination." The form was signed and dated. A copy of appellant-husband's Form W-2P (Retirement Pay) prepared by his former employer was attached to the return. The form W-2P reported that retirement pay in the amount of $19,394.94 had been paid to appellant-husband and that no state income tax had been withheld.

Respondent notified appellants that their return was not valid and demanded that they file a return containing all information required by law. When appellants failed to file that return, respondent issued a Notice of Additional Tax Proposed to be Assessed. The assessment was estimated on the basis of income information available from appellants' 1978 state return and appellant-husband's actual retirement pay for the taxable year in question. Respondent also imposed a 25 percent penalty for failure to file a return (Rev. & Tax. Code, § 18681); a 25 percent penalty for failure to file a return after notice and demand (Rev. & Tax. Code, § 18683); and a 5 percent penalty for negligence (Rev. & Tax. Code, § 18684). Appellants protested. Respondent later affirmed its proposed assessment. This appeal followed.

While this appeal was pending, appellants filed a return for 1979 which respondent accepted. That return showed the total tax due to have been $1,109.00. Respondent maintains that appellants owe also a $277.25 penalty for failure to file upon notice and demand and a $55.45 penalty for negligence, for a tax and penalties total of $1,441.70. Since appellants have paid $1,129.59, the balance remaining is $312.11.

It is settled law that respondent's determinations of additional tax, including the penalties involved in this case, are presumptively correct, and the burden rests upon the taxpayer to prove them erroneous. (Todd v. McColgan, 89 Cal.App.2d 509 [201 P.2d 414] (1949); Appeal of Ottar G. Balle, Cal. St. Bd. of Equal., Feb. 6,

1980; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.)

Appellants maintain that they filed a timely and sufficient return originally because their failure to provide all the information which the return form required was a valid exercise of their Fifth Amendment rights against self-incrimination, so imposition of any penalties on the basis that their first return was incomplete constitutes an impermissible violation of those Fifth Amendment rights.

Appellants cite Garner v. United States, 424 U.S. 648 [47 L.Ed.2d 370] (1976), as authority for their position. In that case, Garner had filed federal income tax returns in which he had reported his occupation as that of a "professional gambler" and had reported substantial income from "gambling" or "wagering." Later Garner was indicted for a conspiracy involving the use of interstate transportation and communication facilities to "fix" sports contests, transmit bets and betting information, and to distribute illegal betting winnings. The prosecution introduced that information from his returns to demonstrate Garner's familiarity with gambling in order to rebut Garner's claim that his relationships with the other conspirators were innocent. Garner contended that the privilege against self-incrimination entitled him to have those returns excluded from the trial notwithstanding he had failed to claim the privilege against self-incrimination on the returns. The Supreme Court held, however, that Garner was not entitled to have that evidence excluded from his trial, and Garner's conviction stood. The case does not stand for the proposition that percentage penalties of the kind here at issue may not be applied when a taxpayer refused to file a timely return with any information about the amounts of his income, deductions or credits.

We point out that in appeals of this type we have consistently upheld similar penalty assessments. (Appeal of Donald W. Cook, Cal. St. Rd. of Equal., May 21, 1980; Appeal of Arthur J. Porth, Cal. St. Bd. of Equal., Jan. 9, 1979.) We conclude that penalties for failure to file after notice and demand and negligence were justified in this case as well.

Appeal of Ellsworth E. and Carolyn L. Tulberg

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause, appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Ellsworth E. and Carolyn L. Tulberg against a proposed assessment of additional personal income tax and penalties in the total amount of $8,668.47 for the year 1979, be and the same is hereby modified to reflect respondent's concession that appellants' tax liability was $1,109, that the penalty for failure to file should be deleted, that the penalty for failure to file after notice and demand should be reduced to $277.25, that the negligence penalty should be reduced to $55.45, and that payment has been made in the total amount of $1,129.59. In all other respects, the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 21st day of June, 1983, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg and Mr. Nevins present.

William M. Bennett, Chairman

Conway H. Collis, Member

Ernest J. Dronenburg, Jr., Member

Richard Nevins, Member

_____, Member